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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 257

SOUTHERN PACIFIC COMPANY, a corporation,
Petitioner,
vs.
CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES EELK,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA TO REVIEW FIVE CASES INVOLVING IDENTICAL OR CLOSELY RELATED QUESTIONS.

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INTRODUCTORY STATEMENT.

This is the reply of plaintiff Charles M. Gileo to defendant's petition for a writ of certiorari out of this Court.

QUESTION PRESENTED.

The petition of the Southern Pacific Company, a corporation, for a writ of certiorari out of this Court is asked upon the alleged grounds that the Supreme Court of California erroneously held that plaintiff was entitled to recover damages for personal injuries under the provisions of the Federal Employers' Liability Act (45 U.S.C.A. Sec. 51) when he was injured while engaged in the construction of new railroad cars that were being made to meet a shortage, which said cars were to be used by the defendant and its subsidiary in interstate commerce.

STATEMENT OF THE CASE AND SUMMARY OF LAW AND FACTS.

The defendant Southern Pacific Company is a common carrier by rail engaged in interstate commerce. The plaintiff is a carman regularly employed by the Southern Pacific Company, and his job rights are controlled by his position on the regular seniority lists. At the time of the accident he was engaged in constructing 5,000 new railroad cars. There was no date set for the completion of this program, it was purely temporary to meet a shortage, and when completed plaintiff would go to whatever job his seniority rights entitled him to.

The Southern Pacific Company was confronted with a shortage of cars to carry on its interstate commerce business and the interstate commerce business of its subsidiary company (Texas & New Orleans Railroad

Company). To meet this shortage, arrangements were made for the manufacture of new cars at Sacramento, California, by order of the Board of Directors of the Southern Pacific Company. These cars were all to be used in interstate commerce, by the defendant or its subsidiary. The plaintiff was injured while engaged in the construction of these new cars.

The Federal Employers' Liability Act provides in part:

> "Every common carrier by railroad while engaging in commerce between any of the several States —shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * *"
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Chapter."
>
> (53 Stats. 1404; 45 U.S.C.A. Sec. 51) as amended 1939.

The plaintiff was clearly entitled to the benefits of the act, for

(a) The defendant was a common carrier by railroad engaged in commerce between the several states.

(b) The plaintiff was employed by the defendant.

(c) The plaintiff's duties were in furtherance of interstate commerce, making cars to be used in interstate commerce to relieve a shortage.

(d) The plaintiff's duties directly, closely and substantially affected such commerce by alleviating a shortage of cars for interstate commerce.

The opinion of the California Supreme Court is in accord with the decisions of the various Courts, Federal and State, that have had occasion to decide the applicability of the second paragraph of the act added by amendment in 1939. This amendment broadened the act and has clarified its application.

The defendant has relied on cases that were decided before the amendment of 1939, and are not in point here; except for *Moser v. Union Pacific R.R. Co.*, 147 Pac. 2d 336, decided by a divided Court, and with which the Supreme Court of California here disagreed. All other cases are in accord with the opinion in this case.

Shelton v. Thomson, 148 F. 2d 1;

Brainard v. A.T. & Santa Fe, 89 F. Supp. 921;

Agostino v. Pennsylvania R. Co., 50 F. Supp. 726;

Ericksen v. Southern Pacific Company, 39 Cal. 2d 374;

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Wills v. Terminal R. Assoc., 205 S.W. 2d 942;

Trucco v. Erie R. Co., 45 A. 2d 20;

Jordan v. Baltimore & Ohio R. Co., 62 S.E. 2d 806.

The decision of the California Supreme Court is in accord with the spirit and intent of the 1939 amendment, which was to broaden the act and to eliminate the technical and finely drawn distinctions that the Southern Pacific Company is again attempting to raise through the language of cases decided before the amendment.

The language of the opinion presents a clear and concise statement of that situation:

> "We cannot agree with the reasoning of the majority opinion in the Moser case. Under the language added by the amendment, an employee of a common carrier by railroad is entitled to the benefits of the act if his duties further interstate commerce or affect it in any way 'directly or closely and substantially,' regardless of whether the work which he is doing may be classified as new construction or repairs. The cars on which plaintiff was working were intended to be used in interstate commerce, and it is clear that the construction of the cars furthered such commerce."

The statute as amended makes no distinction between new construction and repairs; all that is required as the opinion states is that the work "directly or closely and substantially" affect such commerce.

Also, there is no time element in the amendment. If "any part" of the duties of the employee furthers interstate commerce, the employee comes within the act. Under the wording and intent of the amendment of 1939, it is immaterial what mechanical task the employee is engaged in at the time. The test is whether

or not it was in furtherance of interstate commerce; or secondly, whether his duties in any way closely and substantially affected the furtherance of interstate commerce.

The amendment itself is stated disjunctively, that is, it covers an employee if any part of his duties furthers interstate commerce, *or* if any part of his duties in any way directly, or closely and substantially affect such commerce.

CONCLUSION.

The opinion and decision of the California Supreme Court being in conformity with the purpose of the 1939 amendment to the Federal Employers' Liability Act, which broadens and clarifies the applicability of that act, and with the decided cases since the amendment of 1939, it is submitted that petitioner's petition states no ground for the granting of a writ of certiorari by this Court, and that therefore the petition for writ of certiorari by the Southern Pacific Company, a corporation, should be denied.

Dated, Oakland, California,
August 15, 1955.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Respondents.

D. W. BROBST,
Of Counsel.